

Leon Greenberg, NSB 8094
 Dana Sniegocki, NSB 11715
 Leon Greenberg Professional Corporation
 2965 South Jones Boulevard, Ste. E-4
 Las Vegas, Nevada 89146
 Tel (702)383-6085
 Fax (702)385-1827

Christian Gabroy, NSB 8805
 Gabroy Law Offices
 The District at Green Valley Ranch
 170 S. Green Valley Pkwy, Ste 280
 Henderson, NV 89012
 Tel (702)259-7777
 Fax (702)259-7704

Attorneys for Plaintiffs

UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA

FRANK COHN, Individually and on)	Case No.: 2:11-CV-1832-JCM-RJJ
behalf of a class of all)	
similarly situated persons,)	PLAINTIFF'S MOTION FOR
)	CIRCULATION OF NOTICE
Plaintiff,)	OF THE PENDENCY OF THIS ACTION
)	PURSUANT TO 29 U.S.C. § 216(B)
v.)	AND FOR OTHER RELIEF
)	
RITZ TRANSPORTATION, INC., AWG)	
AMBASSADOR, LLC, ALAN WAXLER,)	
and RAYMOND CHENOWETH,)	
)	
Defendants.)	

Pursuant to 29 U.S.C. § 216(b) the plaintiff, through his attorneys, Leon Greenberg Professional Corporation and Gabroy Law Offices, hereby moves this Court for an Order directing that other persons similarly situated to the plaintiff be given notice of the pendency of this action and an opportunity to file written

1 consents with this Court to join this action as party plaintiffs
2 and for other associated relief including a toll of the statute
3 of limitations otherwise applicable to such persons' claims for
4 the period of time that this motion is pending before the Court.

5 Plaintiff's motion is made and based upon the declaration of
6 plaintiff and the memorandum of points and authorities submitted
7 with this motion and the other papers and pleadings in this
8 action.

9
10 **MEMORANDUM OF POINTS AND AUTHORITIES**

11 **PRELIMINARY STATEMENT**

12 Plaintiff submits this memorandum of points and authorities
13 in support of his motion to advise persons similarly situated to
14 the plaintiff of the pendency of this action pursuant to 29
15 U.S.C. § 216(b) ("§ 216(b)") and toll the statute of limitations
16 for such persons to join this action while this motion is
17 pending. This action is brought under the Fair Labor Standards
18 Act, 29 U.S.C. §§ 201-219 (the "FLSA") for unpaid overtime wages.

19 **PROCEDURAL POSTURE OF THIS CASE**

20 **The Court is Being Asked to Assist**
21 **Other Persons in Becoming "Opt In"**
Plaintiffs Pursuant to § 216(b)

22 This litigation is brought as an "opt in" representative
23 action under § 216(b) in respect to the FLSA claims and an
24 F.R.C.P. § 23 ("Rule 23") "opt out" class action in respect to
25 various Nevada State law claims. The "opt in" procedure of §
26 216(b) prohibits any person from being a plaintiff in an FLSA
27 action unless he/she files a written consent with the Court. A
28 Rule 23 class action certification of the plaintiffs' State Law

1 claims would bind all persons with such State Law claims unless
2 they "opt out" of this litigation. These different procedural
3 approaches are not antagonistic and can be harmonized in a
4 complementary fashion. See, *Ansoumana v. Gristede's Operating*
5 *Corp.*, 201 F.R.D. 81 (S.D.N.Y. 2001), *Brzychnalski v. Unesco,*
6 *Inc.*, 35 F. Supp. 2d 351 (S.D.N.Y. 1999), *Beltran-Benitez v. Sea*
7 *Safari*, 180 F. Supp. 2d 772 (E.D.N.C. 2001), and, most recently,
8 *Wang v. Chinese Daily News, Inc.*, 623 F.3d 743, 760 (9th Cir.
9 2010).

10 Plaintiff's counsel believes the facts of this case will
11 ultimately compel a Rule 23 class certification of the
12 plaintiff's State Law claims but makes no request for such class
13 certification as part of this motion. This motion only requests
14 the circulation of a notice of the pendency of this action to
15 other persons pursuant to § 216(b) so they can "opt in" to this
16 litigation under the FLSA. This is called a "collective action
17 certification for notice purposes" to distinguish it from a Rule
18 23 "class action" certification.

19 An immediate FLSA § 216(b) "opt in" notice is requested
20 because of the different processes used by § 216(b) and Rule 23.
21 Under § 216(b) no person is bound by, or benefits from, an FLSA
22 litigation unless they "opt in" by filing a written consent with
23 the Court, and the statute of limitations on such person's FLSA
24 claim continues to run until they file a written consent. Under
25 Rule 23 all persons, except those who "opt out", are bound by the
26 litigation and the statute of limitations is tolled for all class
27 members when the Complaint is filed. Rule 23 class actions,
28 because they affect many persons who have made no affirmative

1 choice to join the litigation (they have simply failed to "opt
2 out") require close judicial scrutiny and procedural safeguards
3 to protect such "silent" participants. FLSA actions under §
4 216(b) do not present the same concerns. FLSA plaintiffs make an
5 affirmative and conscious choice to "opt in" and join the
6 litigation and there are no "silent" FLSA participants whose
7 interests need to be protected by the Court.

8 The lack of a class wide toll of the statute of limitations
9 in FLSA cases should also cause the Court to err in favoring
10 providing notice to other persons of their "opt in" rights at the
11 earliest stage of the litigation. Failing to provide such prompt
12 notice frustrates the FLSA's broad remedial purposes and its
13 specific grant of collective action rights to employees.

14 **The Courts Have Fashioned Notice Procedures In FLSA Cases**

15 The FLSA is silent on how notification should be given to
16 other similarly situated persons in § 216(b) collective actions.
17 *Braunstein v. Eastern Photographic Laboratories, Inc.*, 600 F.2d
18 335, 336 (2nd Cir. 1978), was the most notable early Circuit
19 Court decision approving a District Court Order directing written
20 notice to similarly situated persons in a § 216(b) lawsuit.
21 *Braunstein* was endorsed by *Hoffmann-La Roche, Inc. v. Sperling*,
22 493 U.S. 165, 110 S. Ct. 482, 107 L. Ed. 2d 480 (1989),
23 overruling the 9th Circuit's contrary decision in *Kinney Shoe*
24 *Corp. v. Vorhes*, 564 F.2d 859, 862 (9th Cir. 1977) (Holding that
25 notice of pendency could not be issued in § 216(b) actions).

26 **QUESTIONS PRESENTED**

27 Plaintiff's motion presents four general questions for the
28 Court's consideration:

1. Should notice of the pendency of this action be given to other persons "similarly situated", which for the purpose of this motion is defined as (a) persons who were hired by defendants to perform work as Shuttle Bus Drivers; (b) Performed bus driving services in the State of Nevada; and (c) Were paid on a "straight time no overtime" compensation system and did not receive overtime pay as required by the FLSA?

2. What form should such notice take? and;

3. What time limit should the Court set for additional persons to "opt in" to this litigation? and;

4. Should the Court toll the statute of limitations for persons who "opt in" to this case for the period of time it takes the Court to decide this motion and for notice of this action to be distributed?

STATEMENT OF FACTS

Defendants, Ritz Transportation, Inc., AWG Ambassador, LLC, (collectively "Ritz" or "the corporate defendants") and their owners and managers, Alan Waxler ("Waxler") and Raymond Chenoweth ("Chenoweth"), employ shuttle bus drivers to drive their customers to and from various locations throughout the state of Nevada. The named plaintiff was employed by Ritz as a shuttle bus driver in April 2010. (Ex. "A" ¶ 2). As a shuttle bus driver, plaintiff was compensated on a "straight time no overtime" basis, meaning he was paid his regular hourly amount even for hours he worked that were in excess of 40 hours per week. *Id.* at ¶ 3. This "straight time no overtime" compensation system was the same for all of the shuttle bus drivers employed by the defendants. *Id.* at ¶ 4. Frequently,

1 those shuttle bus drivers worked well in excess of 40 hours per
2 week but receive no overtime pay. *Id.*

3 Defendants' "straight time no overtime" pay practice is
4 demonstrated by a sample of the plaintiff's pay records, attached
5 as an exhibit to plaintiff's declaration. *Id.* at ¶ 3 and see,
6 Ex. "1" to Ex. "A." Such records indicate that plaintiff worked
7 in excess of 40 hours per week but was not paid the required time
8 and one-half his regular hourly rate for each hour worked over 40
9 in a week. *Id.* There were well over 100 other shuttle bus
10 drivers employed by the defendant during the time the plaintiff
11 was employed and each shuttle bus driver was subject to the same
12 flat, hourly no-overtime compensation system. *Id.* at ¶ 4.

13 ARGUMENT

14 **POINT I.**

15 **NOTICE OF THE PENDENCY OF THIS ACTION SHOULD BE GIVEN**

16 Whether other potential FLSA plaintiffs should receive
17 notice that an FLSA action is pending, and of their right to join
18 such an action, involves a single issue: "Whether the other
19 members of the proposed collective action are 'similarly
20 situated.'" *Foster v. The Food Emporium*, 2000 W.L. 1737858, 2000
21 U.S. Dist. LEXIS 6053, J. McMahon, (S.D.N.Y. 2000), citing
22 *Hoffman v. Sbarro, Inc.*, 982 F. Supp 249 (S.D.N.Y. 1997). The
23 issues considered on a Rule 23 class certification motion, such
24 as numerosity, typicality, commonality and representativeness,
25 are not considered on a motion to circulate notice of the
26 pendency of an FLSA action. *Id.*

27 Then District Court Judge, and now United States Supreme
28 Court Justice, Judge Sonia Sotomayor, in *Kumar Realite v. Ark*

1 *Restaurants Corp.*, 7 F.Supp. 2d. 303, 306 (S.D.N.Y. 1998),
2 engaged in one of the most extensive discussions of the standards
3 Courts should use to decide FLSA notice of pendency motions.
4 Plaintiff's counsel refers at length to *Kumar Realite* and its
5 succinct summary of the controlling law and the issues before the
6 Court:

7 The threshold issue in deciding whether to authorize
8 class notice in an FLSA action is whether plaintiffs have
9 demonstrated that potential class members are "similarly
10 situated." See, 29 U.S.C. § 216(b). Neither the FLSA nor
11 its implementing regulations define the term "similarly
12 situated." However, courts have held that plaintiffs can
13 meet this burden by making a modest factual showing
14 sufficient to demonstrate that they and potential plaintiffs
15 together were victims of a common policy or plan that
16 violated the law. See, *Jackson v. New York Telephone Co.*,
17 163 F.R.D. 429, 431 (S.D.N.Y.1995) (at the preliminary
18 notice stage, "plaintiffs are only required to demonstrate a
19 factual nexus that supports a finding that potential
20 plaintiffs were subjected to a common discriminatory
21 scheme"); *Krueger v. New York Telephone Co.*, 1993 WL 276058
22 (S.D.N.Y. July 21, 1993) (when the litigation is in its
early stages, plaintiffs need only provide "some factual
basis from which the court can determine if similarly
situated plaintiffs exist"); *Schwed v. General Electric Co.*,
159 F.R.D. 373, 375-76 (N.D.N.Y.1995) ("plaintiffs need only
describe the potential class within reasonable limits and
provide some factual basis from which the court can
determine if similarly situated potential plaintiffs
exist"); *Heagney v. European American Bank*, 122 F.R.D. 125,
127 (E.D.N.Y.1988) (requiring "some identifiable factual
nexus which binds the named plaintiffs and potential class
members together as victims of a particular alleged
discrimination") (quoting *Palmer v. Reader's Digest Ass'n*,
42 Fair Empl. Prac. Cas. (BNA) 212, 1986 WL 11458
(S.D.N.Y.1986)).

1 Nor must this Court wait for defendant to complete its
2 discovery before authorizing class notice. To the contrary,
3 [so long as the "similarly situated" requirement has been
4 met], courts have endorsed the sending of notice early in the
5 proceeding, as a means of facilitating the FLSA's broad
6 remedial purpose and promoting efficient case management. See
7 *Braunstein*, 600 F.2d at 336 (notice to potential plaintiffs
8 "comports with the broad remedial purpose of the Act, which
9 should be given a liberal construction, as well as with the
10 interest of the courts in avoiding multiplicity of suits");
11 *Frank v. Capital Cities Communications, Inc.*, 88 F.R.D. 674,
12 676 (S.D.N.Y.1981) ("the experiences of other employees may

1 well be probative of the existence vel non of a discriminatory
2 practice, thereby affecting the merits of the plaintiff's own
3 claims"); *Schwed*, 159 F.R.D. at 375 ("[E]ven where later
4 discovery proves the putative class members to be dissimilarly
5 situated, notice ... prior to full discovery is appropriate as
6 it may further the remedial purpose of the [FLSA]."), *Cook v.*
7 *United States*, 109 F.R.D. 81, 83 (E.D.N.Y.1985) ("Certainly,
8 it is 'unlikely that Congress, having created a procedure for
9 representative action, would have wanted to prevent the class
10 representative from notifying other members of the class that
11 they had a champion.' ") (citation omitted); *Krueger*, 1993 WL
12 276058 at *2 ("[E]ven if plaintiff's claims turn out to be
13 meritless or, in fact, all the plaintiffs turn out not to be
14 similarly situated, notification at this stage, rather than
15 after further discovery, may enable more efficient resolution
16 of the underlying issues in this case.").

17 The only published decision by this Court discussing this
18 issue was Judge Pro's decision in *Bonilla v. Las Vegas Cigar*
19 *Company*, 61 F. Supp. 2d 1129 at 1139 n.6 (D. Nev. 1999). Although
20 Judge Pro did not cite *Kumar Realite*, or discuss this issue at
21 great length, he did find, as in *Kumar Realite*, that while
22 plaintiffs bear the burden of proving that they are "similarly
23 situated" this "is a lenient burden." See, *Thiebes v. Wal-Mart*,
24 1999 U.S. Dist. LEXIS 18649, p.8, 1999 U.S. Dist WL 1081357 (D. Or.
25 1999) and *Ballaris v. Wacker Stilttronic Corp.*, 2001 U.S. Dist.
26 LEXIS 13354, p. 7, 2001 U.S. Dist. WL 1335809 (*Bonilla* recognized
27 that a § 216(b) FLSA collective action is certified, for notice
28 purposes, under a much more lenient "similarly situated" standard
than that imposed by Rule 23).

Defendants may argue that Rule 23 controls § 216(b) FLSA
collective actions by citing the distinctly minority view of some
District Courts, most notably *Shuashan v. University of Colorado*,
132 F.R.D. 263 (D. Colo. 1990). This minority view has been
rejected by the only Circuit Courts to examine the issue. See,
Thiessan v. General Electric Capital Corp., 267 F.3d 1095, 1105

1 (10th Cir. 2001) (Congress "clearly chose" to not have Rule 23
2 standards apply to § 216(b) actions) which overruled *Shuashan*¹ and
3 *Hipp v. Liberty National Life Ins. Co.*, 252 F.3d 1208, 1214 (11th
4 Cir. 2001) (The "similarly situated" requirement of § 216(b) is
5 "not particularly stringent" and implicitly rejecting a Rule 23
6 approach).

7 The FLSA's lenient "similarly situated" standard for "notice
8 only" certification logically flows from the procedural framework
9 of the FLSA. No person is bound by the decision in an FLSA case
10 unless they come forward and affirmatively "opt in" to the
11 litigation. The strong public policies underlying the FLSA impose
12 upon the Court a broad duty to assist employees in the exercise of
13 FLSA secured rights. See, *Biggs v. Wilson*, 1 F.3d 1537, 1539 (9th
14 Cir. 1993), cert. denied, 510 U.S. 1081 (1994), and *Abshire v.*
15 *County of Kern*, 908 F.2d 483, 485 (9th Cir. 1990), cert. denied,
16 498 U.S. 1068 (1991). Liberally granting requests for "notice
17 only" collective action certification of FLSA cases furthers this
18 broad remedial purpose.

19 It is of critical importance to recognize that the "notice
20 only" collective action certification being sought *will not* result
21 in this case actually proceeding to trial or disposition on a
22

23 ¹ The District Courts since *Shuashan* have almost "unanimously
24 shunned the Rule 23 standards" for § 216(b) cases. Cole and Bainer,
25 *To Certify or Not to Certify: A Circuit-By-Circuit Primer on the*
26 *Varying Standards for Class Certification in Actions Under the Fair*
27 *Labor Standards Act*, 13 B.U. Pub. Int. L. J. 167, 172 (2004). See,
28 also, Borgen and Ho, *Litigation of Wage and Hour Collective Actions*
under the Fair Labor Standards Act 7 Empl. Rts. & Employ. Pol'y J.
129, 135 (2003) (Surveying decisions and finding that a "consensus"
has been reached by the District Courts that § 216(b)'s "similarly
situated standard does not incorporate Rule 23 requirements.")

1 collective action basis. The FLSA's collective action process
2 utilizes a "two tier" certification approach. See, *Mooney v.*
3 *Aramo Servs., Co.*, 54 F.3d 1207, 1213-14 (5th Cir. 1995) and
4 *Lusardi v. Xerox Corp*, 118 F.R.D. 351 (D.N.J. 1987) (both holding
5 that first tier notice only certification should be issued in FLSA
6 cases freely and liberally without requiring any large quantum of
7 evidence but the Court, after the conclusion of discovery, may, at
8 second tier hearing, deny collective action treatment for trial
9 purposes or decertify the collective action). See, also, *Schwed*
10 *v. Gen. Elec. Co.*, 159 F.R.D. 373, 375 (N.D.N.Y. 1995) (the
11 remedial purposes of the FLSA favor first tier notice only
12 certification even in cases where it is later established after
13 second tier review that no collective action should proceed).

14 Within the last seven years, at least four different District
15 Judges of this Court, and three Magistrate Judges, in eight
16 different cases of which plaintiff's counsel is aware, have
17 embraced the modest factual showing and lenient standard for FLSA
18 notice only certification requests and granted such
19 certifications. See, *Brown v. Terrible Herbst, Inc.*, CV-S-05-
20 0008-RCJ-LRL, Magistrate Judge Lawrence R. Leavitt, Report and
21 Recommendation of September 23, 2005, adopted, over defendants'
22 objections, by the January 11, 2006, Order of District Court Judge
23 Robert C. Jones; *Morales v. Allied Building Crafts*, CV-S-04-1365-
24 LRH-LRL, Order of Magistrate Judge Lawrence R. Leavitt of March
25 16, 2005, adopted by District Court Judge Larry R. Hicks by Order
26 of May 31, 2005, over defendants' objections; *De La Mora v. Silver*
27 *Dollar Recycling Inc.*, CV-S-05-0950-RLH-RJJ, Order of District
28 Court Judge Roger L. Hunt of February 8, 2006; *Westerfield v.*

1 *Fairfield Resorts, Inc.*, CV-S-05-1264-JCM(RJJ) (Minute Order of
2 District Judge James C. Mahan of March 29, 2006); *Williams v.*
3 *Trendwest*, CV-S-05-605 RCJ(LRL) (Magistrate Judge Lawrence R.
4 Leavitt, Report and Recommendation of September 29, 2006, adopted,
5 over defendants' objections, by the December 7, 2006, Order of
6 District Court Judge Robert C. Jones); *Reyes v. Cover-All*, CV-S-
7 07-148 RCJ(PAL), (Magistrate Judge Peggy A. Leen, Order of August
8 27, 2007, Docket #68, adopted over defendant's objections by the
9 March 19, 2008, Order of District Court Judge Robert C. Jones,
10 Docket #119); *Cranney v. Carriage Services*, CV-S-07-1587 RLH(PAL),
11 Order of February 29, 2008, Docket #65, of Chief Judge Roger L.
12 Hunt; and *Pittman v. Westgate Planet Hollywood*, CV-S-09-878
13 PMP(GWF), Order of September 1, 2009, Docket #39, of Magistrate
14 Judge George Foley, Jr.

15 The potential plaintiffs in this case, the shuttle bus
16 drivers, are "similarly situated" for FLSA purposes. They all
17 worked as shuttle bus drivers for the defendants. They did not
18 receive any overtime pay for working in excess of 40 hours per
19 week and all were paid on the same "straight time no overtime"
20 basis. Notice should issue to all shuttle bus drivers working for
21 the defendants within the three years preceding the filing of this
22 motion.

23 **POINT II**

24 **A PROPOSED NOTICE OF PENDENCY IS PROVIDED**

25 A proposed Notice of Pendency is provided at Exhibit "B."
26 This Notice of Pendency is based upon a form approved for use by
27 this Court in the cases of *Morales v. Allied Building Crafts*, CV-
28 S-04-1365-LRH-LRL (Order of Magistrate Judge Lawrence R. Leavitt

1 of October 6, 2005) and *Westerfield v. Fairfield Resorts, Inc.*,
2 CV-S-05-1264-JCM(RJJ) (Minute Order of District Judge James C.
3 Mahan of March 29, 2006). Such form of notice was also approved
4 subsequently by this Court in *Pittman v. Westgate Planet Hollywood*
5 *Las Vegas*, 09-CV-878-PMP-GWF (Order of Magistrate Judge George
6 Foley, Jr. September 1, 2009).

7 **POINT III**

8 **THE COURT SHOULD GRANT AT LEAST A ONE HUNDRED TWENTY DAY**
9 **PERIOD FOR ADDITIONAL PLAINTIFFS TO JOIN THIS LITIGATION**
10 **AND DIRECT APPROPRIATE INFORMATION DISCLOSURE TO**
11 **PLAINTIFF'S COUNSEL AND PROMINENT DISTRIBUTION OF**
12 **THE NOTICE OF PENDENCY BY THE DEFENDANT**

13 The Court may be reluctant to Order notification of this
14 lawsuit to other potential plaintiffs without imposing some time
15 limit on the joinder of additional plaintiffs. Plaintiff's
16 counsel urges the Court to allow additional plaintiffs to join
17 this litigation for at least one hundred twenty days after
18 notification is mailed to the potential plaintiffs. This time
19 period is reasonable and should not delay the progress of this
20 case. Plaintiff's counsel strongly believes that imposing a
21 shorter time limit for persons to come forward and join this
22 litigation would be unfair, as some potential plaintiffs may be
23 traveling or away from home or involved in other matters and not
24 able to respond to a written communication within a shorter time
25 span.

26 Plaintiff requests that his counsel be provided with the
27 names, addresses, phone numbers and email addresses of all
28 shuttle bus drivers employed by defendant since October 26, 2008.
Plaintiff also requests that the notice of pendency and consent
form be conspicuously posted in Defendants' place of business for

1 its shuttle bus drivers to review for a 90 day period, that
2 defendants be required to email the notice and consent to its
3 shuttle bus drivers, and that defendants be required to publish
4 it in the next three issues of its employee newsletters, if any.
5 These notice and disclosure procedures were ordered by Judge Hunt
6 of this Court in *Cranney v. Carriage Services*, 07-S-CV-1587
7 Docket # 65, Order of February 29, 2008, p. 9-10 and should be
8 instituted in this case.

9 **POINT IV**

10 **THE COURT SHOULD TOLL THE STATUTE OF LIMITATIONS IN THIS**
11 **CASE FOR THE PERIOD OF TIME THAT THIS MOTION IS PENDING**

12 Under the FLSA, the statute of limitations on each
13 individual "opt in" plaintiff's claim continues to run until
14 his/her consent to joinder is filed with the Court (there is no
15 class wide toll as in Rule 23 class actions). It is requested
16 that the statute of limitations be tolled for all "opt in"
17 plaintiffs for the period of time that this motion is pending.
18 Such a statute of limitations toll would deny the defendants any
19 benefit from unsuccessfully opposing the plaintiff's motion to
20 circulate a notice of pendency. This Court, in *Westerfield v.*
21 *Fairfield Resorts, Inc.*, CV-S-05-1264-JCM(RJJ), and in its other
22 decisions, cited *supra*, denied such a request, while granting the
23 requested FLSA notice only certifications. In *Westerfield* the
24 Court, while perhaps sympathizing with the plaintiff's concerns,
25 did not grant such a stay based on the record presented in that
26 case. Plaintiff raises this issue both because he believes such
27 a stay is justified and to preserve it in the record of this
28 case's proceedings.

1 Allowing the FLSA's statute of limitations for potential
2 plaintiffs to continue running while a motion for a notice of
3 pendency is being decided encourages defendants to *always* oppose
4 such motions irrespective of the merits of such opposition. The
5 Court should not encourage such conduct or be burdened with
6 considering such meritless motion opposition. Nor should the
7 Court's inability to immediately decide motions allow a party to
8 "win" something of significant value by opposing a motion and
9 delaying action by the Court even though the party "loses" the
10 motion on the merits.

11 There is no fair basis for an FLSA defendant to oppose the
12 sort of statute of limitations toll being requested. If the
13 defendants' motion opposition is successful, there will be no
14 notice of pendency circulated. If the defendants' opposition
15 fails, the defendants are no worse off than if they had never
16 opposed the motion in the first place. The only difference is
17 that the defendants are denied any benefit from unsuccessfully
18 opposing the motion to circulate a notice of pendency. This is
19 absolutely fair to all concerned.

20 Federal District Courts, in general, rarely use their power
21 to equitably toll a statute of limitations. This is
22 understandable, but the unique circumstances presented by the
23 FLSA's "notice of pendency" procedure and "written consent"
24 filing requirement, and the FLSA's broad remedial purposes,
25 militate in favor of the limited use of such equitable tolling
26 powers in this case.

27 The advancement of the FLSA's broad remedial purposes should
28 not be frustrated by a defendant's exercise of their right to

1 oppose a FLSA notice of pendency. If the Court were capable of
2 instantaneously resolving disputed notice of pendency requests
3 there would be no reason for it to equitably toll the statute of
4 limitations while it considered such requests. But the Court
5 cannot instantaneously resolve such disputes. This creates an
6 inherent conflict between the Court's duty to liberally enforce
7 the FLSA, and assist in the advancement of its broad remedial
8 purposes, and the Court's obligation to give the defendants a
9 fair hearing on their objections to the notice of pendency. The
10 only proper remedy for this conflict is to toll the FLSA's
11 statute of limitations while the Court rules on a defendant's
12 opposition to a notice of pendency.

13 The decision in *Burrows v. AON Risk Services of Texas, Inc.*,
14 Docket H-01-2723, May 14, 2002, p. 2-3. (S.D. Tex.) recognized
15 the compelling need to toll the FLSA's statute of limitations for
16 potential plaintiffs while a defendant exercises its rights
17 before the Court. In that case various defendants sought
18 dismissal on jurisdictional grounds, and the Court limited
19 discovery to jurisdictional issues until the defendants'
20 jurisdictional motions were decided. As the Court observed, this
21 created a situation where the rights of potential FLSA plaintiffs
22 would be adversely impacted if no equitable toll of the statute
23 of limitations was imposed:

24 In consideration of the pendency of these motions
25 [to dismiss on jurisdictional grounds], this Court
26 limited discovery between the parties to jurisdictional
27 issues. However, Plaintiffs expressed concerns that a
28 delay in discovery will likely delay the filing of
their Motion for Notice to Potential Class Members.
Plaintiffs assert that this delay will result in a
corresponding delay of issuance of any court approved
notice to the class. Thus, Plaintiffs argue, the

1 potential class members will be prejudiced because the
2 statute of limitations will continue to run against
potential plaintiffs. 29 U.S.C. § 256(a).

3 Plaintiffs further assert that this prejudice
4 would be unfair should ARS and ASC's [the moving
defendants] motions prove non-meritorious because the
5 Defendants would benefit from the filing of the
unwarranted motions. The Court agrees that, under the
6 circumstances of this case, equitable tolling is
necessary to protect the rights of the potential
7 plaintiffs. The Court agrees that, should Defendants'
motions be denied, the potential class members will
8 have been prejudiced by the passage of time. Allowing
the statute of limitations to continue to run against
9 potential plaintiffs would, in essence, reward
Defendants ARS and ASC for filing motions which
10 ultimately proved to be non-meritorious. Exhibit "I",
p. 2-3.

11 The only decision beside *Burrows* that directly addresses
12 this issue is *Owens v. Bethlehem Mines Corporation*, 630 F.Supp.
13 309 (D. W. Va. 1986). Although the defendants in *Owens* did not
14 engage in any "wrongful conduct" by vigorously opposing the
15 plaintiff's "opt in" class certification motion, the Court,
16 citing *Partlow v. Jewish Orphans' Home of Southern California,*
17 *Inc.*, 645 F.2d 757, 760 (9th Cir. 1981), found that equity, and
18 fairness to the plaintiffs, required that it toll the statute of
19 limitations for the period of time that the motion was pending.
20 630 F. Supp. at 312-313.

21 The defendants' rights and the potential plaintiffs' rights
22 should all be equally respected, and equally preserved, in a
23 manner consistent with the FLSA's broad remedial purposes. That
24 this Court, owing to its volume of cases, and human limitations,
25 must take months to resolve a contested motion should inure to no
26 party's benefit. The limited exercise of the Court's equitable
27 powers to toll the statute of limitations in this case in the form
28 requested by the plaintiffs is proper and entirely consistent

1 with the Court's duty to use such powers sparingly and only to
2 the extent needed to insure substantial justice.

3
4 **CONCLUSION**

5 For all the foregoing reasons, plaintiff's motion should be
6 granted in its entirety together with such other further and
7 different relief that the Court deems proper.

8
9 Dated: December 2, 2011

10 Submitted by the attorneys for the
11 Plaintiffs
12 Leon Greenberg Professional Corporation

13 */s/ Dana Sniegocki*

14 By: _____
15 Dana Sniegocki, Esq.
16 Nevada Bar No.: 11715
17 2965 South Jones Boulevard - Suite E4
18 Las Vegas, Nevada 89146
19 (702) 383-6085
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21
22
23
24
25
26
27
28

EXHIBIT "A"

Christian Gabroy (#8805)
GABROY LAW OFFICES
The District at Green Valley Ranch
170 South Green Valley Parkway, Suite 280
Henderson, Nevada 89012
Tel (702) 259-7777
Fax (702) 259-7704
CHRISTIAN@GABROY.COM

*Attorneys for Plaintiff, individually, and
on behalf of others similarly situated*

UNITED STATES DISTRICT COURT

DISTRICT OF NEVADA

FRANK COHN, Individually and on
behalf of a class of all similarly situated
persons,

Plaintiff,

vs.

RITZ TRANSPORTATION, INC., AWG
AMBASSADOR, LLC, ALAN WAXLER,
and RAYMOND CHENOWETH,

Defendants.

Case: 11-CV-01832 JCM-RJJ

**PLAINTIFF'S DECLARATION IN
SUPPORT OF MOTION FOR
CIRCULATION OF NOTICE OF THE
PENDENCY OF THIS ACTION
PURSUANT TO 29 U.S.C §216(B)
AND FOR OTHER RELIEF**

**PLAINTIFF'S DECLARATION IN SUPPORT OF MOTION FOR CIRCULATION
OF NOTICE OF THE PENDENCY OF THIS ACTION PURSUANT TO
29 U.S.C § 216(B) AND FOR OTHER RELIEF**

FRANK COHN, hereby affirms, under penalty of perjury and pursuant to 28 USC
§1746, that he has personal knowledge of the following statements:

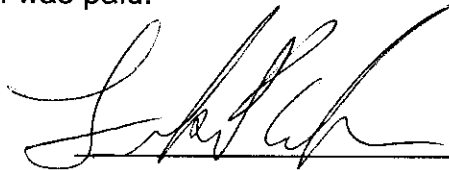
1. I am the Plaintiff in this lawsuit against Defendants RITZ
TRANSPORTATION, INC., AWG AMBASSADOR, LLC, ALAN WAXLER, and RAYMOND
CHENOWETH ("Defendants"). This declaration is in support of Plaintiff's Motion for
Circulation of Notice of the Pendency of this Action Pursuant to 29 U.S.C. § 216(b) and

For Other Relief.

2. I was hired by Defendants in April of 2010 with the title of shuttle bus driver.

3. Defendants did not compensate me overtime for the time I worked in excess of 40 hours per a week at time and one-half my regular hourly rate as required under the Fair Labor Standards Act. Since the commencement of my employment with Defendants, I was under a "straight time no overtime" system, meaning I was paid a flat hourly amount for each hour I worked without any overtime pay (time and one-half pay) for the hours I worked that were in excess of 40 hours per week. For example, I am attaching as Exhibit I a true and accurate copy of my pay statement for the two week period ending September 11, 2011. That statement shows I worked 117.75 hours during those two weeks for a flat hourly rate of \$11.00 an hour. That statement shows I worked at least 37.75 hours of overtime during those two weeks but received no overtime pay from defendants.

4. During the course of my employment I was advised by defendants that there were over 100 other shuttle bus drivers employed by the Defendants. The policy of Defendants was to pay all shuttle bus drivers under the same straight time no overtime compensation system under which I was paid.

 11-30-11

Frank Cohn

Date

EXHIBIT "1"

EXHIBIT "1"

AWG AMBASSADOR, LLC.
4676 WYNN RD
LAS VEGAS, NV 89103-5314

Period Ending: 09/11/2011
Pay Date: 09/16/2011

Taxable Marital Status: Married
Exemptions/Allowances:
Federal: 2
NV: No State Income Tax

00000000038

FRANK COHN
6114 MEADOW VIEW
LAS VEGAS NV 89103

Social Security Number: XXX-XX-2464

Earnings	rate	hours	this period	year to date
Regular	11.0000	117.75	1,295.25	8,809.25
Gratuity				7.00
Vacation				330.00
Gross Pay			\$1,295.25	9,146.25

Deductions	Statutory		
	Federal Income Tax	-66.73	409.17
	Social Security Tax	-52.56	369.38
	Medicare Tax	-18.15	127.52
	Other		
	Checking 1	-935.83	
	Ee + Fam \$34.83	-34.83*	278.64
	Long Term Disib	-18.17	145.36
	Term Life	-1.95	15.60
	Vehicle Damage	-110.00	440.00
	Voluntary Term	-47.90	383.20
	Vsp Ee+Fam \$9.1	-9.13*	73.04
	Adv Cshl		1.00
	Net Pay	\$0.00	

* Excluded from federal taxable wages

Your federal taxable wages this period are
\$1,251.29

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TEAR HERE

VERIFY DOCUMENT AUTHENTICITY: COLORED AREAS MUST CHANGE IN TONE GRADUALLY AND EVENLY FROM DARK AT TOP TO LIGHT AT BOTTOM

AWG AMBASSADOR, LLC.
4676 WYNN RD
LAS VEGAS, NV 89103-5314

Advice number: 00000370038
Pay date: 09/16/2011

Deposited to the account of
FRANK COHN

account number xxxxxxxx1166 transit ABA xxxx xxxx amount \$935.83

THIS IS NOT A CHECK

NON-NEGOTIABLE

EXHIBIT "B"

1 Leon Greenberg, NSB 8094
2 Dana Sniegocki, NSB 11715
3 Leon Greenberg Professional Corporation
2965 South Jones Boulevard, Ste. E-4
4 Las Vegas, Nevada 89146
Tel (702)383-6085
Fax (702)385-1827

5 Christian Gabroy, NSB 8805
6 Gabroy Law Offices
The District at Green Valley Ranch
170 S. Green Valley Pkwy, Ste 280
7 Henderson, NV 89012
Tel (702)259-7777
8 Fax (702)259-7704

9 Attorneys for Plaintiffs

10
11 **UNITED STATES DISTRICT COURT**
12 **DISTRICT OF NEVADA**
13
14

15 FRANK COHN, Individually and on behalf)
16 of a class of all similarly situated persons,)

17 Plaintiff,)

18 v.)

19 RITZ TRANSPORTATION, INC., AWG)
20 AMBASSADOR, LLC, ALAN WAXLER,)
and RAYMOND CHENOWETH,)

21 Defendants.)
22

Case No.: 2:11-CV-1832-JCM-RJJ

23 **NOTICE OF PENDENCY OF COLLECTIVE ACTION LAWSUIT UNDER THE**
24 **FAIR LABOR STANDARDS ACT**
25

26 **TO:** All shuttle bus drivers who were employed by Ritz Transportation, Inc. and AWG
27 Ambassador, LLC in Las Vegas, Nevada and who performed such work after
28 October 24, 2008 and who:

- (A) Were paid on a straight time no overtime basis; and
- (B) Worked more than 40 hours a week and did not receive proper overtime pay at time and one-half their regular hourly rate.

RE: Fair Labor Standards Act lawsuit filed by Frank Cohn against Ritz Transportation, Inc., AWG Ambassador, LLC, Alan Waxler and Raymond Chenoweth, (“defendants”)

INTRODUCTION

The purpose of this notice is to inform you of the existence of a lawsuit in which you may be “similarly situated” to the named plaintiff; advise you of how your rights may be affected by this lawsuit; and instruct you on the procedure for participating in this lawsuit, if you choose to do so.

This Notice is not an expression by the court of any opinion as to the merits of any claims or defenses asserted by any party to this action as those issues have not been decided.

DESCRIPTION OF THE LAWSUIT

This lawsuit was filed on October 26, 2011. The plaintiff alleges, and defendants deny, that defendants violated the Fair Labor Standards Act. Specifically, the plaintiff claims that he is owed overtime pay for all hours he worked over forty (40) hours per week. The plaintiff claims that he was paid under a “straight time no overtime” compensation system. The plaintiff is seeking unpaid wages and liquidated damages in an amount equal to the unpaid wages owed to him under the Fair Labor Standards Act. Defendants dispute plaintiff’s claims and deny that they are liable to the plaintiff for any additional overtime pay.

DESCRIPTION OF A COLLECTIVE ACTION

A collective action is a lawsuit in which the claims of a group or class of people are decided in a single court proceeding. In a collective action brought pursuant to the Fair Labor Standards Act, individuals who are within the class of persons on whose behalf the action is brought must consent to join the action and have their individual claims decided in the action.

COMPOSITION OF THE CLASS

The named plaintiff seeks to sue on behalf of himself and also on behalf of other employees with whom he is similarly situated. Specifically, plaintiff seeks to sue on behalf of all shuttle bus drivers who have worked at Ritz Transportation, Inc. and/or AWG Ambassador, LLC in Las Vegas any time after October 26, 2008.

The employees must be:

- (A) shuttle bus drivers who were employed by the defendants in Las Vegas, Nevada;
- (B) who performed such work after October 26, 2008;
- (C) were paid on a straight time no overtime basis; and
- (D) worked more than 40 hours a week and did not receive proper overtime pay at time and one-half their regular hourly rate.

YOUR RIGHT TO PARTICIPATE IN THIS LAWSUIT

1 If you are an individual within the above described Class and you wish to
2 participate in this case, you may join this case by mailing the enclosed "Consent To Join"
3 form to plaintiff's counsel at the following address:

4 Leon Greenberg Esq.
5 2965 S. Jones Blvd., Suite E-4
6 Las Vegas, NV 89146

7 If you want to join this lawsuit, you must send the form to Leon Greenberg so he
8 has time to file it with the Federal Court on or before _____ days from the issuance of this
9 notice which is _____. If you do not return the "Consent to Join" form in time for
10 it to be filed with the Federal Court, you may not be able to participate in the Fair Labor
11 Standards Act portion of this lawsuit.

12 **LEGAL EFFECT OF JOINING THIS SUIT**

13 If you choose to join this case, you will be bound by the decision of the court,
14 whether it is favorable or unfavorable. The attorneys for the class plaintiffs are being paid
15 on a contingency fee basis, which means that if there is no recovery, the plaintiffs will not
16 have to pay attorneys' fees to plaintiffs' attorneys. If the plaintiffs prevail in this litigation,
17 the attorneys for the class will request that the Court either determine or approve the
18 amount of attorneys' fee and costs they are entitled to receive for their services.

19 If you sign and return the "Consent to Join" form you are agreeing to designate
20 Frank Cohn as your agent to:

- 21 1) make decisions on your behalf concerning this lawsuit;
- 22 2) decide the method and manner of conducting this lawsuit;
- 23 3) enter into an agreement with plaintiff's counsel concerning attorneys'
24 fees and costs; and
- 25 4) decide all other matters pertaining to this lawsuit.

26 These decisions and agreements made and entered into by Frank Cohn will be
27 binding on you if you join this lawsuit. However, the court has retained jurisdiction to
28 determine the reasonableness of any attorneys' fees and costs that are to be paid to the
plaintiff's counsel should plaintiff succeed in this action.

1 **LEGAL EFFECT OF NOT JOINING THIS SUIT**

2 You do not have to join this lawsuit. If you do not wish to participate in this
3 lawsuit, then do nothing. If you choose not to join this lawsuit, you will not be affected by
4 any judgment or settlement rendered in this lawsuit, whether favorable or unfavorable to
5 the class and will receive no money from the Fair Labor Standards Act portion of this
6 lawsuit, if any money is recovered on that claim. If you choose not to join this lawsuit, you
7 are free to file your own lawsuit under the Fair Labor Standards Act.

8 **STATUTE OF LIMITATIONS ON POTENTIAL CLAIMS**

9 The minimum period of time that you may collect unpaid wages under the Fair
10 Labor Standards Act is two (2) years from when you worked the time for which you were
11 not paid proper overtime. If the Defendants' failure to pay overtime wages was willful,
12 then the maximum period of time that you may collect unpaid overtime wages under the
13 Fair Labor Standards Act is three (3) years from when you worked the time for which you

1 were not paid overtime. The statute of limitations continues to run until you file with the
2 court a written consent to join this lawsuit or you file your own lawsuit to collect unpaid
overtime wages.

3 **NO RETALIATION PERMITTED**

4 Federal law prohibits defendants from discharging you or retaliating against you
5 because you have exercised your rights under the Fair Labor Standards Act to collect
unpaid overtime wages.

6 **YOUR IMMIGRATION STATUS DOES NOT MATTER IN THIS CASE**

7 You are entitled to be paid overtime wages and minimum wages under the Fair
8 Labor Standards Act even if you are not otherwise legally entitled to work in the United
9 States.

10 **YOUR LEGAL REPRESENTATIVE IF YOU JOIN**

11 If you choose to join this lawsuit and agree to be represented by Frank Cohn
through his attorney, your counsel in this action will be:

12 Leon Greenberg, Esq.
13 Dana Sniegocki, Esq.
2965 S. Jones Blvd., #E-4
Las Vegas, NV 89146

and

Christian Gabroy, Esq.
170 S. Green Valley Parkway - Suite 280
Henderson, NV 89012

14 **FURTHER INFORMATION**

15 The deadline for filing a "Consent to Join" form is ____ days from the issuance of
16 this notice which is _____. Answers to questions about this lawsuit may be
obtained by contacting:

17 Leon Greenberg, Esq.
18 2965 S. Jones Blvd., #E-4
Las Vegas, NV 89101
19 (702) 383-6369
Email: leongreenberg@overtimelaw.com

20 Email Communications are Preferred

21
22 The court has taken no position in this case regarding the merits of the plaintiffs' claims
23 or of the defendants' defenses.

24 THE DATE OF ISSUANCE OF THIS NOTICE IS: September 6, 2011

25 **DO NOT CONTACT THE CLERK OF THE COURT**

26 DATED this ____ day of _____, 2011.

/s/

27 **UNITED STATES DISTRICT**
28 **JUDGE/MAGISTRATE JUDGE**